No. 12,571

IN THE

United States Court of Appeals

For the Ninth Circuit

DUANE MOSS, et al.,
Appellants,

vs.

HAWAIIAN DREDGING CO., et al.,
Appellees.

MARTIN H. LARSEN, et al.,
Appellants,

vs.

FLOOD BROS., etc., et al.,
Appellees.

APPELLANTS' OPENING BRIEF.

GLADSTEIN, ANDERSEN, RESNER
& LEONARD,
HERBERT RESNER,
RICHARD GLADSTEIN,
EWING SIBBETT,
240 Montgomery Street, San Francisco 4, California,
Attorneys for Appellants.

NAU-WALSH PRINTING CO., SAN FRANCISCO,

Subject Index

Constitutions

Statutes

Other Authorities

No. 12,571

IN THE

United States Court of Appeals

For the Ninth Circuit

DUANE MOSS, et al.,
Appellants,

vs.

HAWAIIAN DREDGING CO., et al.,
Appellees.

MARTIN H. LARSEN, et al.,
Appellants,

vs.

FLOOD BROS., etc., et al.,
Appellees.

APPELLANTS' OPENING BRIEF.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the District Court of the Northern District of California, Southern Division (Judge Louis E. Goodman), deciding in favor of appellees and against appellants certain claims of the latter for overtime compensation under the Fair Labor Standards Act of 1938. (Act of June 25, 1938, C. 676, 52 Stat. 1060, 29 USC §§ 201-219.) (R. 61.)

Originally the case was tried upon its merits and decided in favor of appellees upon certain good faith defenses under the Portal-to-Portal Act of 1947 (Act of May 14, 1947, C. 52, 61 Stat. 84, 29 USC §§251-262). After the case was concluded, the submission was set aside and the case reopened for the purpose of allowing additional evidence. Meantime, Public Law 177 of the 81st Congress, 1st Session, was adopted. (Act of July 20, 1949, C. 352.) On the basis of this statute the trial Court held that irrespective of other considerations the appellants' claims were retroactively wiped out, and entered a supplemental opinion and findings in that respect. (R. 52-55.)

Appellants' motion for a new trial was duly made (R. 56-60) and denied. (R. 63.) Appellants appealed to this Court. (R. 63.)

JURISDICTIONAL STATEMENT.

Jurisdiction of this Court to hear this appeal is conferred by 28 USC §1291.

QUESTION PRESENTED.

There is presented to this Court for determination at this time a single question: The constitutionality of the retroactive feature of Public Law 177.[1] (R. 70.)

---

[1]The text of the statute follows:

Chapter 352—Public Law 177

[H. R. 858]

An Act to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Section 7 of the Fair Labor Standards Act of 1938, as amended, is amended by adding at the end thereof a new subsection (e), to read as follows:

"(e) For the purpose of computing overtime compensation payable under this section to an employee—

(1) who is paid for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the workweek, at a premium rate not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days, or

(2) who, in pursuance of an applicable employment contract or collective bargaining agreement, is paid for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), at a premium rate not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek,

the extra compensation provided by such premium rate shall not be deemed part of the regular rate at which the employee is employed and may be credited toward any premium compensation due him under this section for overtime work."

Section 2. No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to the date of enactment of this Act, if the compensation paid prior to such date for such work was at least equal to the compensation which would have been payable for such work had the amendment made by section 1 of this Act been in effect at the time of such payment.

Approved July 20, 1949.

SPECIFICATION OF ERRORS RELIED UPON.

(1) Public Law 177 on its face and as construed and applied herein insofar as its retroactive feature is concerned, is unconstitutional.

(2) The District Court erred in upholding the constitutionality of the retroactive feature of Public Law 177.

SUMMARY OF ARGUMENT.

Eliminating from consideration at this time the good faith defenses sustained by the Court below, appellants herein would have been entitled to a judgment on their complaint under the decision of the United States Supreme Court in the controlling case of *Bay Ridge Operating Co. v. Aaron* (1948), 334 U.S. 446, 68 S. Ct. 1186, 92 L. Ed. 1502, were it not for the passage of Public Law 177.

Public Law 177 constitutes a legislative attempt to retroactively wipe out appellants' claims which otherwise must have been paid, and to reverse the Supreme Court decision in the *Bay Ridge* decision.

Public Law 177, therefore, constitutes judicial action by the Congress of the United States in plain violation of the Constitution, Article III, which provides:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

It is not the prospective application of Public Law 177 with which we are here concerned. We concede that Congress has the power to amend this statute prospectively, as it has done. Here, however, the overtime compensation rights of these appellants under the Fair Labor Standards Act of 1938 had become vested and their claims had been held compensable under the *Bay Ridge* decision. Congress, therefore, was without power to destroy or take away these vested rights to overtime compensation otherwise payable.

What we have in Public Law 177 is litigation by legislative decree, rather than judicial determination. Such a procedure is incompatible with the command of the Constitution.

ARGUMENT.

I

BACKGROUND AND PRELIMINARY CONSIDERATIONS.

There are involved in this case claims for overtime compensation on behalf of a number of longshore walking bosses (a boss in the longshore industry who oversees the work of longshore gangs aboard a ship) and a number of allied workers in the longshore industry under the Fair Labor Standards Act of 1938.

The longshore industry has never operated on a regular basis so far as daily hours of work are concerned. The comings and goings of vessels, the weather, the running of the tides, conditions in port,

and the demands of the trade could not depend upon regular daytime hours common to most industries.

Accordingly, longshoremen have always worked at nighttime and on Saturdays, Sundays and holidays, when almost all other industries did not work. Longshoremen worked, and continue to work, whenever there is work to do. It came to pass that night work and work on Saturdays, Sundays and holidays constituted regular working hours in the longshore industry. Workers were paid a higher rate for this kind of work than they were for daytime and weekday work; obviously because it was more dangerous, difficult and unpleasant to work at hours other than daytime and weekday hours.

The Supreme Court recognized these facts in *Bay Ridge*, supra, 334 U.S. 455-456:

> "* * * Employment in the longshore industry has always been casual in nature. The amount of work available depends on the number of ships in port and their length of stay and is consequently highly variable and unpredictable, from day to day, week to week, and season to season. Longshoremen are hired for a specific job at the 'shape,' which is normally held three times a day at each pier where work is available. The hiring stevedore selects the men he desires from the longshoremen who are present at the 'shape'; in some instances a group of longshoremen are hired together as a gang. The work may last only for a few hours or for as long as a week. Although some work is carried on at all hours, the stevedoring companies, since operations are then carried

on at less cost, attempt to do as much work as possible during the straight time hours.

"The court further found that the rate for night work and holiday work had been higher than the rate for day work since at least as far back as 1887, and that since 1916, when the first agreement was made with the International Longshoremens Association, the differential was designed to shorten the total number of hours worked and to confine the work as far as possible within the scheduled forty-four hours. Despite the differential, many longshoremen where unwilling to work at night. Although some longshore work was required at all hours, except Saturday night, the District Court found that the differential had been responsible for the high degree of concentration of longshore work to the contract straight time hours."[2]

---

[2]See also Edward E. Swanstrom, *The Waterfront Labor Problem*, Fordham University Press, 1938.

Marvel Keller, *Decasualization of Longshore Work in San Francisco*, Works Progress Administration, National Research Project, Report No. L-2, April 1939.

The employers themselves asserted that there was no "true overtime" in the longshore industry. Thus at the Congressional hearings on Public Law 177 the writer of this brief quoted from testimony of West Coast employer representatives at various hearings in the industry. See *Hearings before a Subcommittee on Labor and Public Welfare, United States Senate, Eighty-first Congress, First Session, on S. 336 and H. R. 858*, pp. 536-537:

> "Frank P. Foisie, then an official of the WEA of San Francisco, sent a letter dated October 24, 1929, to Capt. W. J. Petersen, general manager of Waterfront Employers Union. The letter says:
>
> " 'No such arbitrary restrictions of hours is practiced aboard ship. The effect of a restriction of port hours will be to have shore and ships operations working against each other. We should like to call attention to some equally ill-fitting longshore customs which have been unwisely carried over from shore industries. One of them is the third party (vessel lia-

The work performed at these undesirable times being regular work, the rates of pay at which men were compensated for doing this work became *regular rates of pay.* The fact that the rate of pay might have been one and one-half times the rate for daytime work did not make the rate for nighttime, Saturday,

---

bility) exposure to suit to which ships are exposed under the Longshoremen's and Harbor Workers Compensation Act. Another is the practice of overtime wage which in industry is true overtime beyond 8 hours but which in longshoring is nighttime payment.'

"That letter appears in the proceedings of the National Longshoremen's Board, San Francisco, Friday, August 17, 1934, at page 524.

"On Friday, August 24, 1935, volume 12, page 889 of the same proceedings. Mr. Foisie testified:

" 'Question (Mr. Phleger). The overtime rate represents, do I understand, not worked (sic) performed after a specified number of hours, but work performed after 5 p.m., and during the noon hour, and on holidays?

" 'Answer (Mr. Foisie). That is more accurately described *at* (sic) *nighttime rate. There is practically no true overtime in longshoring;* that is, true overtime as adopted by the factory industries. Time in excess of 8 hours is the conventional overtime. *Nothing of the sort pertains to longshoremen.*' [Our emphasis.]

"Mr. Phleger in arguing the case for the employers stated:

" 'That overtime in longshoring does not represent a wage payable for work in excess of 8 hours but is in substance *a nighttime rate covering all work performed after 5 p.m.* In consequence of the large amount of overtime actually paid, the average wage received by longshoremen is substantially in excess of the base wage, being approximately 95 cents per hour in the various ports.' [Our emphasis.]

"In the 1941-42 wage arbitration in which the arbitrator was a member of this committee, Senator Morse, this testimony appears at page 1728 of the record:

" 'Question (Mr. Melnikow). Do you know of any group with which you have compared the longshoremen's hourly earnings that shows a percentage of 57 percent overtime?

" 'Answer (Mr. Foisie). *No; because of course the overtime in other industries is not the same basically as it is in our industry. In our industry it is a misnomer. It is the period of*

Sunday and holiday work an overtime rate. It became, rather, a *regular rate* for work at *these times.*

During all of the years from 1938 until the advent of Public Law 177 there was a practice in the longshore industry on the part of employers to pay the longshoremen the one and one-half time rate, or even higher rate, for nighttime, Saturday, Sunday and holiday work. Special higher rates were also paid for working dangerous or noxious cargo (penalty rates), or for skill or special classifications. This was designated in contracts between the unions and the employers as an overtime rate, but in truth it was a regular rate for the times or cargo worked.

As far back as 1943 the courts recognized work performed at such times and on such cargo as "regular work" and the rates of pay in such situations "regular rates of pay," on the basis of which the men were entitled to overtime compensation under the Fair

---

day or night in which the work is done. That is peculiar to this industry and it is not common to others. [Our emphasis.]

" 'Question. Do you know of no other agreements which specify that work during certain hours shall be paid at straight time and that all other work outside of those hours shall be overtime?

" 'Answer. There are some industries that have a slight differential for evening work and a heavier one for after midnight, but I don't know of any other industry that operates as we do.'

"At page 670 of the same arbitration Mr. Foisie testified:

" 'Question. Since the period ending September 1936 will you state, Mr. Foisie, whether there has been a trend in the direction of a greater amount of overtime work or less?

" 'Answer. Much greater and steadily so until now there is more overtime work, so-called, which, of course, is *largely a misnomer.* It is not overtime any particular spread of time, but largely the time of day worked.' [Our emphasis.]"

Labor Standards Act of 1938. *International Longshoremen's Ass'n, Local 815, et al. v. National Terminals Corp.* (DC ED Wisc. 1943), 50 F. Supp. 26, in a well reasoned opinion Judge Duffy says at page 29:

> "The statute uses the term, 'the regular rate at which he is employed.' We must determine the regular rate at which each of the plaintiffs was employed. The higher rate for night, Sunday and holiday work is just as much a regular rate as the lower rate for daytime work. The higher rate was merely an inducement to accept employment at times which were not as desirable from a workman's standpoint. Therefore, if any of the plaintiffs worked part of the week at daytime labor in the warehouse and another part of the week at nighttime labor unloading a boat, and the balance of the week at nighttime Sunday labor in the warehouse, the contract rates specified for each of these types of work is the regular rate at which that plaintiff was employed."

The decision was affirmed by the Seventh Circuit. *Cabunac v. National Terminals Corp.* (CCA 7, 1944), 139 F. (2d) 853, at 854, where the court said:

> "It seems evident to us, as it did to the District Court, that the 'overtime' rate was merely the higher rate necessary to induce defendant's employees to accept employment at hours which were not very desirable from a workman's standpoint, and that this rate is the 'regular rate' to be paid for work on the night shift, on Sundays, and on certain holidays, within the meaning of the Fair Labor Standards Act."

A like conclusion was reached by Judge Cooper in *Ferrer v. Waterman SS Co.* (DC Puerto Rico 1947), 70 F. Supp. 1, at page 4:

> "* * * They did not provide for the payment of overtime for the extraordinary hours, instead they specifically provided a series of regular or basic rates which fluctuated according to the time of day and the cargo handled, and bore no relation to hours worked in excess of forty. They were 'the higher rate necessary to induce defendant's employees to accept employment at hours which were not very desirable from a workman's standpoint' and were 'the "regular rate" ' for those hours."

And cf. *Roland Electrical Co. v. Black* (CCA 4, 1947), 163 F. (2d) 417.

Ultimately a number of longshoremen brought suits throughout the country for the overtime compensation they believed themselves entitled to under the FLSA for this nighttime, Saturday, Sunday, holiday, penalty cargo and skilled work. Ultimately this litigation found its way to the United States Supreme Court in the celebrated case of *Bay Ridge Operating Company, Inc., v. Aaron,* supra. The decision had been adverse to the men in the District Court (69 F. Supp. 956), but the Court of Appeals found in favor of the claims (162 F. (2d) 665).

The Supreme Court in that case decided that the nighttime, Saturday, Sunday, holiday, penalty cargo and skilled work was regular work in the longshore industry and that the rates of pay for same consti-

tuted regular rates and were not overtime rates. The Court held that the men were entitled to overtime compensation on such work after forty hours per week. The formula would be this: As to each week the total wages received by the worker is divided by the total number of hours worked during the week. He would probably have different rates of pay according to the times and cargo worked. Thus, daytime, weekday hours would have a different rate of pay than his nighttime hours, or his Saturday, Sunday, or holiday hours, or skilled or penalty cargo work. An average hourly rate would thus be determined. The worker would then be entitled to time and one-half that average hourly rate (which would be the regular rate) for all hours worked during the week in excess of forty hours. He would thus be entitled to the difference between the total wages he received for a particular week and the amount he should have had if his overtime had been computed on the basis just described. It was this formula which was declared to be the proper one by the Supreme Court in the *Bay Ridge* case. (334 U.S. pp. 459, 460.)

This decision was a blow to longshore employers and to various Government agencies which had encouraged employers to violate the statute in the face of warnings from the Wage-Hour Administrator.

As far back as October 1943 employers and Government agencies were on notice that the Wage-Hour Administrator considered the pay practices in the longshore industry violative of the Act. On October

15, 1943, he addressed a letter to Mr. Hubert Wyckoff, assistant deputy administrator for maritime labor relations, War Shipping Administration. That letter is on exhibit supporting the Motion to Reopen and is filed with Clerk of this Court and appears in the text of the hearings on Public Law 177. It follows:[3]

> "Dear Mr. Wyckoff: A recent inspection of Luckenbach Gulf Steamship Co., 120 Wall Street, N. Y., has disclosed a situation which in my view constitutes violation of the overtime pay provisions of the Fair Labor Standards Act of 1938.
>
> "The firm employs stevedores, checkers, and coopers. Under the terms of its employment agreement it pays them a stated rate for work performed between 7 a.m. and 4 p.m. (or between 8 a.m. and 5 p.m.) and a higher rate for work performed during any other times of the day, which under the employment agreement are termed 'overtime' hours. If, as sometimes happens, an employee works more than 40 hours in a workweek, the firm uses the lower daytime rate as a base for computing the overtime pay due to the employee under the Fair Labor Standards Act, even though some or all of the employee's work may have been performed outside of daytime hours.
>
> "The Fair Labor Standards Act required that hours worked in excess of 40 in a workweek must be paid for at not less than one and one-half times the employee's regular rate of pay. When an

[3] *Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, Eighty-First Congress, First Session, on S. 336 and H. R. 858,* pp. 362-363.

employee is paid a stated rate for daytime work, and a higher rate for the same work performed outside of daytime hours, it is my opinion that the higher rate is not a part of overtime pay required by the act, but is fact is simply the regular rate of pay, and if the employee works more than 40 hours in a workweek, the hours in excess of 40 must be paid for at one and one-half times that higher rate. Where an employee has worked at two or more rates of pay in a given workweek, overtime pay under the act may be computed on the basis of one and one-half times the average obtained by dividing total earnings by total hours, but the requirements of the act are not met where the lower rate is used as a base and all payments above that base are offset against overtime pay.

"When the matter was brought to the attention of the firm it stated that its method of payment is common to every firm in the Nation in the same business, and that it is operating under a contract with the War Shipping Administration which prevents any changes in its wage-payment practices without approval of the Administrator of the War Shipping Administration. It is for this reason that I am bringing the matter to your attention and I shall be glad to have any comments or suggestions you care to make. In addition to the responsibilities the act imposes upon me as Administrator, it also authorizes any employee to file his own suit, and, if successful, to recover double the amount of any unpaid overtime wages plus court costs and attorney fees. The possibility of employee suits is ever present and emphasizes the need for prompt action on

the part of employers to bring their practices into conformity with the act.

"Very truly yours,
"L. Metcalfe Walling,
Administrator."

At the hearings described, in which Senators Hill, Morse and Withers sat as a sub-committee, Mr. Max Halpern, Attorney for the United States Maritime Commission, appeared to testify in favor of the retroactive provision of Public Law 177. The record of that hearing clearly demonstrates that government officials were well aware of the Wage-Hour Administrator's opinion that the pay practices in the longshore industry were violative of the law, and longshore employers were also aware of the fact. These longshore employers, therefore, sought and obtained indemnity agreements. Army, Navy and other government officials ignored the Wage-Hour Administrator's opinion and embarked upon an application of their own interpretation of the law.[4]

---

[4]The following revealing colloquy occurred at the hearings:

"Senator Morse. Now, Mr. Halpern, this explanation of yours has been very clarifying as to your reaction, not only of the War Shipping Administration, but apparently the reaction of all of the Government agencies, Navy, Army, Procurement, eventually the Department of Justice, as to the position which the Administrator took in regard to his interpretation of the meaning of the Fair Labor Standards Act in regard to rates of pay. Now, check me very carefully.

"Am I to draw the inference and conclusion from your testimony on this point that after the letter of October 15, 1943, from the Administrator to Mr. Wyckoff of the War Shipping Administration was received, there followed a series of conferences, not only between War Shipping and the Administrator, but between and among War Shipping and Army and

The fact remains that the longshoremen were entitled under the law to the rates of pay determined by the formula approved in *Bay Ridge*. Attorneys

---

Navy and Procurement and even the Department of Justice as to the effects, potential effects of the position of the Administrator as set out in his letter of October 15?

"Mr. Halpern. Quite correct.

"Senator Morse. Is it also correct for me to conclude that the Administrator remained adamant in all of these conferences, insisting that his interpretation of the act as set out in the letter of October 15, 1943, was the interpretation that the Wage and Hour Division was going to stand on?

"Mr. Halpern. I assume so.

"Senator Morse. Is it correct also to infer because of this adamant position and because not even the Department of Justice could persuade him to the contrary, nor Judge Patterson, then Under Secretary of War, or anybody in the Navy, that the stevedoring companies themselves, apparently aware of this situation, became greatly concerned and came to War Shipping and said, in effect, 'Now, look here, we have got to have some protection, we can't go ahead and build up these possible liabilities unless the Government is going to indemnify us for any losses we may suffer from an ultimate adverse decision.'

"Mr. Halpern. I don't know that all the assumptions you have included are actually correct. I don't know how many stevedoring companies had actual knowledge of all this. I think comparatively few. They were represented by an association, the association acted for them, or perhaps by a stevedoring committee. I don't know actually which.

"This stevedoring committee did appear for the stevedoring companies and perhaps the stevedoring committee is the one that had this knowledge and made the representations to the War Shipping Administration that protection was necessary.

"Senator Morse. I understand your testimony to be that representations were made to WSA that caused you to fear that you weren't going to be able to continue with this stevedoring work unless some guaranty could be given to the companies that they would stand no losses as a result of a possible adverse decision.

"Mr. Halpern. Yes. We have in our files a communication from the Waterfront Employers Association and another from, I believe, the New York Shipping Association, in which that point is more or less made. They wanted protection.

"Senator Morse. It is true then, is it not, Mr. Halpern, that the Walling letter and these many subsequent conferences

and others in the Department of Justice, Maritime Commission, Army and Navy, who had advised longshore employers to the contrary, were found to be

---

caused so much consternation among the Government agencies that they became fearful that there might be an interference with stevedoring operations unless some agreement by way of indemnity could be given?

"Mr. Halpern. I gather that from reading the record.

"Senator Morse. And that the Department of Justice was so convinced that the Administrator was wrong in his interpretation of the law that it said to the Government agencies, 'We will be very glad to represent these agencies in defense of any claims made by anyone under the interpretation of the Administrator'; is that in essence the position of the Department of Justice?

* * * * * * *

"Senator Morse. So as one of the results of this series of conferences that ended in no agreement with the Administrator, we finally got into court with this issue and the United States Supreme Court in effect said that the Administrator is right and you fellows are wrong; isn't that it?

"Mr. Halpern. Yes, sir.

"Senator Morse. You want me as a Member of the Senate of the United States to reverse the United States Supreme Court with such a record of controversy and notice and understanding on the part of the parties to this case? I think that would be unconscionable.

"Mr. Halpern. I don't think so.

"Senator Morse. How in the world could we ever justify that as a Congress in this limited case—what I am saying hasn't got anything to do with a lot of other employers that aren't involved in this dispute—*but if the Congress of the United States ever starts laying down a doctrine that we are going to be a super Supreme Court and retroactively change a law that we passed in 1938, I don't know how you could have government by law in this country. You would have government purely by political pressures.* [Our emphasis.]

"Mr. Halpern. The Wage and Hour Administrator is before this committee in support of this bill prospectively.

"Senator Morse. *What has that got to do with the legal right about which notice was given in 1943, with what the Supreme Court has ruled in fact to be legal rights under the Wage and Hour Act? If we ever start doing that to American employers in this country, going back and retroactively taking away some vested right that they got under a statute, what a*

wrong. They thereupon set about to correct their conscious legal error by legislative fiat. Having lost the case in the Courts, they now proceeded to get the

---

howl would go up over that kind of a proposition. I am aghast at this.'' [Our emphasis.]

At the same hearing Senator Morse made the following pertinent statements, p. 369:

''Senator Morse. What does the last comment of yours have to do at all with the question as to whether or not you gentlemen in these various Government agencies were wrong in regard to your interpretation of the law as to what constituted overtime?

''Don't get me wrong. I don't like the idea of windfalls either and I don't like the idea of a lot of uncertainty in the law as to what pay rates are going to be. But that is quite a different thing from this. With all this notice, all this controversy, with adequate time for people to protect themselves, even including insurance protection, they come in now and say great injustice has been done us by the Supreme Court decision because the Supreme Court decided the law in accordance with what the Administrator on this particular point said it was, and we thought the Administrator was wrong.

''I say that, Mr. Halpern, right in the face of your testimony, that you feared a work stoppage if you followed the Administrator's decision, or his notice, in 1943.

''Well, maybe paying the longshoremen more wages would have resulted in a work stoppage, but that hasn't been my experience on the waterfront.

''You said that it would cause inflation. It wasn't for you gentlemen, I may say most respectfully, in War Shipping and the Army and Navy to be passing judgment on matters of policy concerning inflation. There were other agencies that had control of that. Your job was to carry out the law and run whatever risks were involved if you didn't carry it out.

''You said it would increase costs. That in my judgment was of no concern to you if you were trying to decrease costs by taking away legal rights that people had under the law.

''You say that you discussed these pay practices with employers and got the impression that that is what they wanted, as well as what the unions wanted, and my question is: So what? We are dealing here with a question: What are the legal rights? What are these men entitled to?

''Now, I have some more questions later of other witnesses as to what effect the union contract may have had on the indi-

Congress to do what the Supreme Court refused to do. But not only did they ask the Congress, and successfully, to change the situation with respect to the future, they asked Congress to *retroactively* change the situation to support the position they had asserted from the outset![5] They asked Congress by legislative

---

vidual stevedore, the individual employee. That is another story, separate and distinct from what we are pressing on now.

"You tell me that not even Patterson could convince Walling he was wrong and not even the Attorney General could convince him he was wrong. I wish we had more Government officials that would stand up against that sort of opposition and still say, 'I think this is what the law is and we will leave it for the Supreme Court to decide.'

"The Supreme Court decided it, and I need to go and take a walk, because I am so confused now. I thought I had this thing thought through a few days ago, but I am so convinced, Mr. Halpern, by the testimony you have given here this morning—not only of the letter but of a series of arguments you had with the Administrator afterward, every conference apparently putting you on further and further notice that he intended to insist upon the law being applied in accordance with his October 15 letter—that I think you are estopped."

Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, Eighty-First Congress, First Session, on S. 336 and H. R. 858, pp. 366-369.

[5]At the same hearing Senator Morse voiced what we believe are pertinent objections to the retroactive feature of the law. The following appears:

"Mr. Halpern. At the same time, Senator Morse, I can't understand why the Wage and Hour Administrator who in fact guessed right, comes to this committee and supports this bill prospectively to clarify and correct a situation arising out of the Supreme Court's decision and yet does not take the same position with respect to retroactive relief on facts and under conditions precisely the same, the same agreement, the same parties.

"It seems to me if it is good enough for the future, it should be good enough for the past.

"Senator Morse. Of course, I think that is a remarkable statement. I don't know what is in the mind of the Administrator, but I tell you what would be in my mind on that one, sir. I am not committing myself to it as to what I finally will do on any phase of the case, but I am satisfied that the Wage and Hour Act needs to be amended. It needs to be amended

act to reverse *Bay Ridge,* and Congress proceeded to do so by enacting Public Law 177.

Therefore, what we find in the present case is this situation: A statute in force since 1938 which is clear and unambiguous with regard to hours of work and rates of pay; men in an industry who have worked long and hard and have not been paid according to the requirements of that statute and therefore who have earned and have coming certain sums of money; a decision by employers and Government officials to ignore the law and pay the longshoremen as they decided the law should be interpreted; a decision by the United States Supreme Court that the employers

---

so that employers and workers and everybody else don't have to live under the uncertainty that you had to live under, apparently, while this contest has been going on.

"But there is a great deal of difference between passing a law prospectively, making definite and certain what the policy should be in the future, and going back a few years and taking away from people what the United States Supreme Court has ruled happens to be their rights under the law prior to amendment. That is a strange way to amend the law, by taking away rights which the highest court in the country says have been vested in people. That frightens me.

"If the Supreme Court decision means that under that law these men are entitled to this pay as a matter of law, I don't see how I can justify casting a vote saying because it is going to be pretty hard on some employers I am going to take $5 away from Joe Brown, a worker, and give *to it* John Smith, an employer. That is what it amounts to.

"Mr. Halpern. I need not tell you, Senator Morse, Congress has done just that in connection with portal-to-portal claims, and the courts have affirmed its constitutionality.

"Senator Morse. I don't think it has, but you and I could argue that legal point at great length. I think there are great differences between portal-to-portal pay and what is proposed here."

Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, Eighty-First Congress, First Session, on S. 336 and H. R. 858, pp. 370-371.

and these Government agencies were wrong and that the men should be paid as the law provided; an appeal to Congress to amend the law so as to wipe out the effect of the Supreme Court decision; action by Congress granting this request and wiping out the Supreme Court decision. The result: Government by legislative fiat rather than judicial action—a plain violation of Article III of the United States Constitution.

II

PUBLIC LAW 177 IS UNCONSTITUTIONAL.

(1) Public Law 177 on its face and as construed and applied herein insofar as its retroactive feature is concerned, is unconstitutional.

(2) The District Court erred in upholding the constitutionality of the retroactive feature of Public Law 177.

Public Law 177, 81st Congress, 1st Session, insofar as it attempts to wipe out existing overtime claims validated by the Supreme Court in the Bay Ridge decision (*Bay Ridge Operating Co. v. Aaron*, 68 S. Ct. 1186) is clearly unconstitutional, on each of the following grounds:

A

The retroactive provision of Public Law 177 represents an attempt by Congress to exercise judicial power in violation of Article III of the Constitution of the United States.

The Supreme Court has unhesitatingly struck down attempts on the part of the legislature to invade the

judicial domain, to exercise power specifically forbidden to it by our basic law. *Kilbourn v. Thompson*, (1881) 13 Otto 168; *Ogden v. Blackledge*, 2 Cranch 272, 2 L. Ed. 276; *Reynolds v. McArthur*, 2 Peters 417, 7 L. Ed. 470; *United States v. Klein*, (1872) 13 Wall. 128, 20 L. Ed. 519; *Baltimore & Ohio R. R. Co. v. U. S.*, (1936) 298 U.S. 349, 80 L. Ed. 1209.

In *Prentis v. Atlantic Coastline Co.*, (1908) 211 U.S. 210, 226, 53 L. Ed. 150, 158, Justice Holmes stated:

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power."

Here, then, is the test to be applied. Does the action of Congress in the passage of Public Law 177 look solely to the future and change existing conditions "by making a new rule to apply thereafter to all or some part of those subject to its power," or does it also purport to declare and enforce liabilities as they stand on facts and under laws existing at the time of the adoption of that legislation? Does it define a proper course of conduct for the future, or does it also pass judgment on and prescribe a new rule for decisions in pending cases?

The answer is clear. The retroactive provision of Public Law 177 does "declare liabilities * * * on present or past facts"; it not only declares "what the

law is''—but also what the law was as to liabilities incurred long before the Act was passed; it determines the sum payable to appellants by the appellees under the employment relationship in existence prior to its adoption. This retroactive provision operates in precisely the sphere in which only the Courts can take—and have taken—action.

In its decision in the *Bay Ridge* case, the United States Supreme Court construed the provisions of the Fair Labor Standards Act in relation to a particular employment situation. In doing this, the Court was exercising its normal judicial function of construing and enforcing the rights and liabilites of parties under existing law. Its decision in this regard is "final, and binding upon all other departments of that government and upon the people themselves until they see fit to change their Constitution," *Webster v. Cooper*, 55 U.S. 488, 14 L. Ed. 510. The 81st Congress has attempted to declare that this decision is not "final and binding." Congress lacks the constitutional power to thus reverse decisions of our highest court.

As the Court pointed out in *Kilbourn v. Thompson*, *supra*, the judicial and legislative functions cannot be identical if the doctrine of the separation of powers is to have any meaning. If the Courts are exercising judicial functions in construing the application of the Fair Labor Standards Act to past transactions, the Congress cannot perform that function as well. Either the determination of these liabilities is judicial or it is legislative. If it is legislative, then the Courts do not have power to render final decisions in these cases

at all. If it is judicial, then Congress has no constitutional authority to impose its will upon the judiciary.

It is clear that Congress, by the enactment of the retroactive provision of Public Law 177 has presumed to interfere with and to nullify the declaration and enforcement by the United States Supreme Court of liabilities as they stood on past facts. Congress did not, in passing Public Law 177, look solely to the future in order to change conditions and make a new rule to be applied thereafter. It also sought to change rules already laid down by the Supreme Court for a past period during which it had no competence whatsoever.

Cooley, at page 190, Volume I of his *Constitutional Limitations*, states the rule as follows:

> "But the legislative action cannot be made to retroact upon past controversies and to reverse decisions which the court, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, for the legislature would in fact act as a court of review to which parties might appeal when dissatisfied with rulings of the Court."

In Public Law 177 we are faced more clearly than at any time in American Constitutional history with precisely such an effort on the part of Congress to "act as a court of review to which parties may appeal when dissatisfied with rulings of the court," and to

subject the judgments of the Supreme Court to re-examination and revision by Congress itself.

The effect of holding the retroactive provision of Public Law 177 constitutional would be enormous. In practically all cases arising under public laws, there is an interval during which the constitutionality, the meaning and effect of the law, and the extent of the rights and obligations it creates, are subject to judicial scrutiny. During this interval, the membership of Congress may change and the policies and purposes which motivated an earlier Congress may not find support in its successor. To permit that successor Congress to do what the 81st Congress here seeks to do would place a premium upon disregard of the solemn determinations of our highest Court. Litigants would be encouraged to continue to resist liabilities judicially determined, because of the possibility of these liabilities being vacated and set aside by later Congressional Act. The courts would thus be rendered merely intermediate bodies. A final appeal to Congress might always be made for relief from the effect of judicial decisions as to past transactions.

If the people of the United States desire to repose judicial power in Congress they may do so by adopting an appropriate constitutional amendment. Until the Constitution is so amended, however, this Court has no alternative but to apply the Constitution as it stands today, to recognize and insist upon adherence to the principle of the separation of legislative and judicial power, and to declare void the retroactive provisions of Public Law 177.

B

The retroactive provision of Public Law 177 is unconstitutional in that it deprives the appellants of their property without due process of law in violation of the Fifth Amendment.

The courts have unhesitatingly struck down attempted invasion of vested rights, attempted destruction by the Legislature of causes of action already accrued. And they have done so even where national policy and the immediate equities were on the side of the invading legislation.

Forbes Pioneer Boat Line v. Everglades Drainage Dist. (1922), 258 U.S. 338, 66 L. Ed. 647;

Osborne v. Nicholson (1872), 80 U.S. 654, 20 L. Ed. 689;

Steamship Co. v. Joliffe (1865), 2 Wall. 450, 17 L. Ed. 805;

Hathorn v. Calef (1865), 2 Wall. 10, 17 L.Ed. 776;

Ochiltree v. Iowa Railroad (1875), 21 Wall. 249, 22 L. Ed. 546;

Ettor v. City of Tacoma (1913), 228 U.S. 148, 57 L. Ed. 773;

Coombes v. Getz (1932), 285 U.S. 434, 76 L. Ed. 866;

Lynch v. United States (1934), 292 U.S. 571, 78 L. Ed. 1434;

Treigle v. Acme Homestead Association (1936), 297 U.S. 189, 80 L.Ed. 575;

Duke Power Company v. South Carolina Tax Commission (CCA 4, 1936), 81 F. (2d) 513;

National Surety Corporation v. Wunderlich (CCA 8, 1940), 111 F. (2d) 622;

Badger v. Hoidale (CCA 8, 1937), 88 F. (2d) 208;

Harrison v. Remington Paper Company (CCA 8, 1905), 140 F. 385, 390;

Knickerbocker Trust Company v. Myers (CC Pa. 1904), 133 F. 764, 767.

Public Law 177 rasies squarely the important constitutional question whether Congress has the power to enact legislation the avowed purpose and effect of which is to destroy previously matured causes of action for unpaid overtime compensation and liquidated damages under the Fair Labor Standards Act. The constitutional question is a most important and far-reaching one. For if Congress has the power to destroy, as they have attempted to do in this instance, rights which have become vested in working people, there is nothing to prevent a future Congress of a different political complexion from taking similar action with reference to the vested rights of members of other economic groups.

Our constitutional prohibitions against retroactive legislation which destroys previously acquired rights lie in the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides that no person shall "be deprived of life, liberty or property without due process of law." Similarly, Section 1 of the Fourteenth Amendment provides "nor shall any state deprive any person of life, liberty or property without due process of law." It is well settled that these provisions of the Fifth and Fourteenth Amendments mean the same thing

and that precedents under the one are equally controlling as precedents under the other.

Curry v. McCanless (1939), 307 U.S. 357, 369, 83 L. Ed. 1341;

Bowles v. Willingham (1944), 321 U.S. 503, 518, 88 L. Ed. 892.

Congress in the exercise of its power must conform with the due process clause of the Fifth Amendment.

Louisville Joint Stock Land Bank v. Radford (1935), 295 U.S. 555, 589, 79 L.Ed. 1593;

Virginian Ry. Co. v. System Federation (1937), 300 U.S. 515, 558, 81 L. Ed 789;

Currin v. Wallace (1939), 306 U.S. 1, 14, 83 L. Ed. 441.

Many Supreme Court cases have established the principles underlying the rule against retroactive legislation, and the basis for the exceptions to the rule. We will discuss only a few of the more important of these cases.

Coombes v. Getz (1932), 285 U.S. 434, 76 L. Ed. 865. The California Constitution provided that directors of corporations should be liable to creditors for all moneys embezzled or misappropriated by corporate officers. While creditors who had contracted with the corporation were suing a director to enforce their rights, this provision of the Constitution was repealed. The Court, in permitting the creditors to recover despite the repealing statute, stated (p. 442):

> "The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provi-

sion. His cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right), * * *", citing among many other cases, Ettor v. Tacoma, supra; Hathorn v. Calef, supra; Steamship Co. v. Joliffe, supra; Ochiltree v. Railroad Co., supra; Knickerbocker Trust Co. v. Myers, supra.

In applying the general rule to the facts of this case, the Court stated (at page 448):

"Here both parties acted. The creditor extended credit to the corporation; and his action in so doing, under the state constitutional provision, brought into force for his benefit the constitutional obligation of the director, which, by becoming a director, the latter had voluntarily assumed and, thereby, in the eyes of the law created against himself a contractual liability in the nature of a suretyship. Harrison v. Remington Paper Co., supra, p. 388. Doubts which otherwise might have existed in respect of the character and effect of the transaction are no longer open. It is settled by decisions of this and other federal courts (*Ettor v. Tacoma*, and cases cited in connection therewith, supra) that *upon the facts here disclosed, a contractual obligation*

arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. I, §10, and the due process of law clause in the Fourteenth Amendment, of the Federal Constitution." (Emphasis added.)

Ettor v. Tacoma (1913), 228 U.S. 148, 57 L. Ed. 773. The State of Washington by statute required municipalities to compensate property holders for damages resulting from street grading. While these actions for damages under this statute were being heard, the statute was repealed. The District Court took the position that the right of action was statutory and fell with the statute. The Supreme Court reversed, holding (p. 156):

"The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. The obligation of the city was fixed. The plaintiffs in error had a claim which the city was as much under obligation to pay as for the labor employed to do the grading. It was a claim assignable and enforceable by a common-law action for a breach of the statutory obligation.

"The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. *This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a*

property right. Nothing remained to be done to complete the plaintiff's right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation." (Emphasis added.)

Hathorn v. Calef (1865), 2 Wall. 10. A state statute provided that stockholders should be liable for the debts of the corporation. A creditor sued a stockholder although the individual liability provision had been repealed two months after the debt was contracted. The Supreme Court held that by virtue of the statute, the stockholders "agree to become security to the creditors for the payment of the debts of the company, which have been contracted upon the faith of this liability"; and that the repealing act impaired the obligation of the contract.

Steamship Co. v. Joliffe (1865), 2 Wall. 450. A California statute provided that when a pilot went outside the harbor and offered his services to a vessel and the services were declined, the pilot was entitled to one-half pilotage fees. Pending recovery on a suit for one-half pilotage fees, the statute was repealed. It was claimed that recovery could not be had because the right was statutory and could therefore be taken away. The Supreme Court disagreed, holding (p. 807):

"The claim of the plaintiff below for half-pilotage fees, resting upon a transaction regarded by the law as *quasi* contract, there is no just

ground for the position that it fell with the repeal of the statute under which the transaction was had. *When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands, independent of the statute.* And such is the position of the claim of the plaintiff below in the present action; the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed." (Emphasis added.)

Forbes Pioneer Board Line v. Everglades Drainage District (1922), 258 U.S. 338. A suit was brought for repayment of tolls collected for passage through a canal in the face of a statutory prohibition against such collection. On the day of the decision in that suit the Legislature passed an act purporting to validate those tolls and to destroy the plaintiff's cause of action. Mr. Justice Holmes held that the legislative enactment was unconstitutional and the boat line could not be deprived of its right to recover the overcharge. He said (p. 340):

"Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right. It is hard to find any ground for saying that the promise of the law that the public force shall be at the plaintiff's disposal is less absolute than it is when the claim is for goods sold. Yet no one would say that a claim for

goods sold could be abolished without compensation."

It is well settled constitutional law that a legislature cannot enact a new or different statute of limitation which will have the effect of barring a cause of action which has already *accrued.*

Ochoa v. Hernandez (1913), 230 U.S. 139 (p. 161), 57 L. Ed. 1427, 1438:

> "With reference to statutes of limitations, it is well settled that they may be modified by shortening the time prescribed, but only if *this be done while the time is still running, and so that a reasonable time still remains for the commencement of an action before the bar takes effect.*" (Emphasis added.)

Wheeler v. Jackson (1890), 137 U.S. 245, 34 L.Ed. 659, 663:

> "It is the settled doctrine of this court that the Legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced, *provided, in each case, a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect.*" (Emphasis added.)

Appellants' right to overtime compensation and liquidated damages under the FLSA is a vested right, contractual in nature.

Overnight v. Missel (1942), 316 U.S. 572, 86 L. Ed. 1682.

In *Brooklyn Savings Bank v. O'Neil* (1945), 324 U.S. 697, 89 L. Ed. 1297, the Court affirmed the position taken in the *Missel* case. In denying that rights under Section 16 (f) of the Fair Labor Standards Act could be waived, the Court held (p. 709) that the rights were of a "private-public character," and the "sole right to bring such suit was *vested* in the employee under Section 16(b)." (Emphasis added.)

In *Reid v. Solar Corporation* (DC ND Iowa 1946), 69 F. Supp. 626, the Court held that causes of action under the FLSA constituted property (p. 637):

> "Existing actions constitute property within the meaning of constitutional guarantees and a legislature body cannot annul or destroy such rights of action. State v. Louisiana Oil Refining Corporation, La. App. 1937, 176 So. 686, 687, 691, 692. See also Korisek v. Brigham, 1926, 169 Minn. 57, 210 N. W. 622, 623, 49 A. L. R. 1260. An employee's claim for overtime compensation and liquidated damages under the Fair Labor Standards Act obviously constitutes property of which an employee may not be deprived without due process of law."

See also *Northwestern Yeast Co. v. Brousin* (CCA 6, 1943), 133 F. (2d) 628; *Hays v. Bank of America* (1945), 71 C. A. (2d) 301.

The proponents of the retroactive provisions of Public Law 177 claim that as the rights of the employees which are here invaded are statutory in nature, such rights can never be said to vest. But as evidenced by the cases just cited, such is not the law. These cases hold that a right or an obligation is not re-

moved from the protection of the Constitution merely because such obligation or such right would not have existed except for a particular statutory provision. There is no principle in our constitutional law which places non-statutory law on any higher plane than legislative enactment.

Thus in *Ettor v. Tacoma, supra*, we have seen that the right held to be constitutionally protected against retroactive legislation was the right to sue a municipality under the terms of a State statute. *No right to do so would have existed in the absence of that statute.*

Still the Supreme Court refused to allow the right to be retroactively destroyed. The Court stated simply and directly that the right "was fixed by law in force when their property was damaged for public purposes and the right so vested cannot be defeated by subsequent legislation." The fact that the "law in force" was statutory law had no effect whatsoever upon the Court's determination.

Similarly in *Coombes v. Getz, supra,* the obligation was statutory in precisely the same sense as the obligations under the Fair Labor Standards Act are statutory.

In *Steamship Co. v. Joliffe, supra,* the Supreme Court refused to accept the argument that recovery could be defeated by a subsequent statute because the original right was "statutory."

Likewise in *Hathorn v. Calef, supra,* and *National Surety Corp. v. Wunderlich* (CCA 8, 1940), 111 F. (2d) 622, rights were protected against divestment by

retroactive legislation although in each case they were founded exclusively upon statute.

There is no distinction between these cases and the cases at bar. No obligation would have existed here if the Fair Labor Standards Act of 1938 had never been adopted. But similarly, in the cases we have cited, there would have been no obligation if the statutes there involved had never been passed.

If we examine the few cases in which the Courts have held that the statutory rights there involved did not vest, and could be defeated by a repeal of the statute which created them, we shall see clearly that entirely different circumstances were involved. These exceptional cases fall into several classes in all of which there are factors wholly absent in the cases at bar.

1. Where a right based upon a statute is purely executory, is entirely conditioned upon an eventuality which has not materialized at the time that the statute is repealed, such repeal and the removal of the right have been held to be valid. Thus, in *Pearsall v. Great Northern R. Co.* (1896), 161 U.S. 646, 40 L.Ed. 838, it appeared that the Legislature had adopted a statute removing the power of a corporation, originally granted by its charter, to consolidate with other lines. Thereafter, the corporation sought to engage in a consolidation and was prevented from doing so by the operation of the later statute. The Court held that under these circumstances no vested rights had been disturbed since the power to consolidate had not been exercised at the time the repealing Act was passed.

In the cases at bar, the appellants have rendered to their employer the services upon which their right to compensation is based. They are not objecting to the deprivation of their right to claim similar compensation for services to be rendered in the future. They are objecting to the deprivation of their rights as to past transactions.

2. An inchoate right to maintain an action or to secure a benefit for which no consideration has been given may be avoided by legislation even while a suit is pending. Thus, in *Western Union Telegraph Co. v. Louisville & Nashville R. R. Co.* (1922), 258 U.S. 13, 66 L. Ed. 437, a telegraph company, acting under a statutory authority, brought a condemnation proceeding in which it sought to secure the property of a railroad company. After judgment had been rendered for the telegraph company, and pending appeal, the Legislature passed another statute repealing the right of condemnation in such a case. The Court here upheld the statute on the ground that the right created was merely the *right* to bring an action. The telegraph company had done nothing to earn the power sought to be exercised; it had given no consideration for the right it claimed. Under these circumstances the Court held that "no rights had so far vested in the telegraph company as to preclude a change of policy or legislation which affected it."

This principle, too, has no application to the instant cases, because here the workers have given consideration, i.e., their physical labor, for the right granted by the statute.

3. On the same basis it has been held that there is no vested right to the collection of a statutory penalty. For example, in *Norris v. Crocker,* 13 How. 429, a suit for a penalty payable under the Fugitive Slave Law of 1793 to a slave owner by a person who had harbored, rescued or obstructed the arrest of a fugitive slave was held not to be maintainable after the provision for the penalty had been repealed, even though the suit was commenced prior to the repeal. The Court pointed out that the penalty was payable regardless of loss or injury and accordingly no right could vest therein. And in *Maryland v. Baltimore & Ohio R. R. Co.,* 3 How. 534, 11 L.Ed. 714, the repeal of a State law providing for the forfeiture of a certain amount of money was held to deprive no one of any vested rights since "being a penalty imposed by law, the legislature had the right to remit it." This doctrine is closely related to that involved in the *Western Union* case. For, obviously, the payment of a *penalty* by its very terms imports an absence of consideration.

But in the present cases no such situation is presented. The compensation sought by the appellants is *not* a penalty. In *Brooklyn Savings Bank v. O'Neill, supra,* p. 707, the Supreme Court laid to rest any suggestion that the overtime or liquidated damage provisions of the Fair Labor Standards Act are in the nature of a penalty, stating:

> "We have previously held that the *liquidated damage provision is not penal in its nature* but constitutes compensation for the retention of a workman's pay which might result in damages

too obscure and difficult of proof for estimate other than by liquidated damages. *Overnight Motor Transp. Co. v. Missel,* 316 U.S. 572, 86 L.Ed. 1682, 62 S.Ct. 1216. It constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency, and general wellbeing.' Employees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their wellbeing and efficiency until such sums are paid at a future date." (Emphasis added.)

4. Again flowing from the principle that a right does not vest where a claimant has suffered no injury and has given no consideration for the enjoyment of the privilege claimed, it has been held that there is no vested right in a governmental gratuity. Thus in *In Re Hall,* (1897) 167 U.S. 38, 42 L.Ed. 69, it appeared that a judgment had been entered in a certain amount by the Court of Claims under an Act of 1895. An appeal was taken to the Supreme Court of the United States where the judgment was reversed on the grounds that the Court of Claims had improperly included interest in determining the amount due to the claimant. An application was then made for entry of judgment on the mandate of the Supreme Court and pending consideration of this application, Congress passed a statute repealing the Law of 1895 and abolishing the claim.

The Court held that the application for judgment was properly denied since:

> "This Court had just decided that the act of February 13, 1895 (28 Stat. at L. 664, Chap. 87), simply conferred a gratuity upon the persons covered by its provisions; that *there was no element of a legal or an equitable claim in their favor* against the municipal authorities of the District, but that *the act provided for a gift which was wholly without consideration.*" (Emphasis added.)

Obviously the appellants here do not seek the vindication of a right founded upon a governmental bounty. The right they seek to enforce is based upon services rendered by them for their employers.

5. Finally, there are a variety of situations in which retroactive statutes invade no rights at all. Such statutes may (a) alter the form of the remedy without impairing the right, without removing all legal avenues for securing its enforcement; (b) ratify acts of the Government unlawful when performed; (c) provide a remedy for a moral obligation of the Government (the gratuity cases in reverse); (d) allow the enforcement of a right where, for some technical reason, the existing method of enforcement may not be available; or (e) legalize express contracts unlawful when made, and thus serve to prevent individuals from taking advantage of their own unlawful conduct at the expense of their partners in illegality.

We have discussed the limits of the rule that in certain special instances statutory rights may be retroactively vacated. The rationale behind these decisions is that there was no right which vested. There

was no damage which by law should be repaired. But a right which is not based upon the bare statute itself, a right which is based upon acts performed under the statute, upon consideration given in accordance with the terms of the statute, cannot be subsequently impaired. What the Supreme Court considers of importance in cases involving a statutory right is whether or not all steps necessary to perfect the right have been taken in each case. In the *Ettor* case the plaintiffs had suffered the damage described in the statute. In the *Joliffe* case the plaintiff had offered his services and had thus performed the act entitling him to the recovery. In the *Coombes* case the plaintiff had complied with the condition necessary to establish the defendant's liability in that he had extended credit to a corporation of which defendant was a director. In each of the remaining cases cited, the plaintiffs had similarly done everything required *under the statute* to perfect their statutory claims. In the instant cases the appellants have likewise performed all of the acts necessary to establish their right to recovery under the Fair Labor Standards Act. They have contributed their time and energy to their employer for his gain. They have engaged in compensable work. They have *earned* the right to the compensation prescribed by the FLSA. Just as in *Ettor v. Tacoma, supra,* when the "amending" statute was here passed, "nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage." What the Courts are saying, in effect, is that

a particular session of a legislature cannot fetter or impair the accomplishments of its predecessors as to past facts. It cannot reach back to a time when it was not in existence at all and nullify for that time what its predecessor has done. The 81st Congress cannot act as though it were the 75th Congress. It cannot lay down rules of conduct for a period during which not it, but previous Congresses, were in session. It cannot upset rules of conduct or alter rights and obligations which arose during a period in which it had no existence and no constitutional competence whatsoever.

Not only has the 81st Congress in this instance sought to change the Fair Labor Standards Act as it was in force during previous sessions, but it is also attempting to veto a decision of the United States Supreme Court. If such a result can be accomplished, then vested rights will never be secure.

C

The gold clause cases are inapplicable.

Proponents of the retroactive provision of Public Law 177 rely principally on the so-called "gold clause" cases. (*Norman v. Baltimore & O. R. Co., U.S. v. Bankers Trust, etc.* (1935), 294 U.S. 240, 79 L. ed. 885). An examination of these cases, in the background of the critical situation which faced the Country at the time the legislation in question was passed by Congress, i.e., June, 1933, shows conclusively that they do not support the constitutionality of Public

Law 177. On June 5, 1933, Congress, faced with a grave economic and monetary crisis, passed a resolution which had the effect, among other things, of invalidating and rendering unenforcible all clauses in previously executed contracts requiring payment in gold. The Supreme Court upheld the constitutionality of this resolution on the ground that the existing contracts could not stand in the way of the paramount power of Congress under Article I, Section 8 of the Constitution "to coin money, regulate the value thereof, and of foreign coin." Obviously, because of the critical situation which existed at the time the law was passed, Congress could not effectively regulate the value of the currency in the face of a tremendous volume of private money obligations calling for payment only in gold of a stated weight and fineness, particularly when the entire credit and currency structure of the Country rested upon that particular medium of exchange. In the gold clause cases we have a direct and irreconcilable clash between private contractual rights and the power of Congress to regulate the currency. As Chief Justice Hughes stated, in page 316:

> "We are concerned with the constitutional power of the Congress over the monetary system of the Country and its attempted frustration. Exercising that power, the Congress has undertaken to establish a uniform currency, and parity between kinds of currency, and to make that currency, dollar for dollar, legal tender for the payment of debts. In the light of abundant experience, the Congress was entitled to choose such

a uniform monetary system, and to reject a dual system, with respect to all obligations within the range of the exercise of its constitutional authority. The contention that these gold clauses are valid contracts and cannot be struck down proceeds upon the assumption that private parties, and States and municipalities, may make and enforce contracts which may limit that authority. Dismissing that untenable assumption, the facts must be faced. We think that it is clearly shown that these clauses interfere with the exertion of the power granted to the Congress and certainly *it is not established that the Congress arbitrarily or capriciously decided that such an interference existed.*" (Our emphasis.)

Thus in the gold clause cases the Court found that the contracts upon which it was claimed rights had vested, were in direct conflict with and in effect nullified and frustrated the power of Congress to determine the value of the Country's currency. There is no parallel in the cases at bar. The power exercised by Congress in enacting the Fair Labor Standards Act was one calculated to improve conditions of labor and was exercised under the commerce clause of the Constitution. By no stretch of the imagination can it be contended that a recovery of unpaid wages under the principles enunciated in the Bay Ridge decision would nullify or frustrate the power of Congress to regulate commerce.

The rationale of the gold clause cases has no application, therefore, to the cases at bar.

D

The cases upholding the constitutionality of the retroactive provisions of the Portal-to-Portal Act of 1947 are inapplicable.

We are, of course, familiar with the recent Circuit and District Court decisions upholding the retroactive application of the so-called "good faith" defenses provided in the Portal-to-Portal Act of 1947. These cases upheld the Act on two grounds: (1) That the rights involved were purely statutory and could, therefore, be divested retroactively; (2) That in its "Findings" prefacing the Portal Act, Congress "found" that a national emergency would result if the acquired rights were not divested, and therefore Congress had the inherent power to take steps to avert the emergency, even to the extent of divesting previously acquired rights.

On the "statutory rights" point, we have already shown that this is not a proper ground for permitting Congress to enact retroactive legislation.

As to the "emergency" point, these decisions are also erroneous. It is well settled constitutional law that the existence of an emergency does not warrant an exception being made to the general rule against retroactive legislation.

Home Bldg. and Loan Assn. v. Blaisdell, (1934), 290 U.S. 398, 426, 78 L.Ed. 413, 422;

Wilson v. New, (1917) 243 U.S. 332, 348, 61 L.Ed. 755, 773;

Louisville Joint Stock Land Bank v. Radford, (1935), 295 U.S. 555, 79 L.Ed. 1593;

Terry v. Anderson, (1877), 95 U.S. 628, 24 L.Ed. 365;

Ex parte Milligan, (1866), 4 Wall. 2, 18 L.Ed. 281.

These cases clearly establish the proposition that no matter how pressing the emergency, no matter how extreme the requirements of the Nation may be, Congress may not exercise an authority which is forbidden to it by the Constitution. And in these cases, the Court was faced with legislative efforts to deal with situations far more fraught with danger to the public interest than were presented by the congressional recitals in the Portal-to-Portal Act of 1947, even if those recitals were accepted at their full face value.

The Supreme Court was unequivocal in *Louisville Joint Stock Land Bank v. Radford, supra,* when it said that "the Fifth Amendment commands that *however great the nation's need,* private property shall not thus be taken *even for a wholly public use* without just compansation." (Emphasis added.) It was unequivocal in *Terry v. Anderson,* 95 U.S. 628, 24 L.Ed. 365, when it held that remedial legislation, but *not* the impairment of the obligation of a contract or the destruction of a vested right, was called for in a situation where "the business interests of the entire people of the State had been overwhelmed by a calamity common to all," where "society demanded that extraordinary efforts be made to get rid of old embarrassments and permit a reorganization upon the basis of a new order of things."

But nowhere was this principle more forcefully stated than in *Ex parte Milligan, supra.* There it was held that not even the emergency of war for the survival of the Union could justify the invasion of the rights protected by the Constitution. The Court solemnly declared:

> "* * * Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads direct to anarchy or despotism.* * * *" (Emphasis added.)

However, conceding arguendo that the so-called Portal-to-Portal claims did confront the Country with a national emergency which justified drastic action on the part of Congress, there is an important difference between Public Law 177 and the Portal-to-Portal Act. Public Law 177 contains no finding of an emergency, as does the Portal Act, and of course there could be no such a finding.

CONCLUSION.

We submit, therefore, that the retroactive provision of Public Law 177 is clearly unconstitutional and that it is therefore the duty of this Court to so hold.

Dated, San Francisco, California,
October 4, 1950.

GLADSTEIN, ANDERSEN, RESNER
& LEONARD,
HERBERT RESNER,
RICHARD GLADSTEIN,
EWING SIBBETT,
Attorneys for Appellants.